FILE COPY

JUN 18 19[illegible]

JAMES R. BROWNING

No. 966

In the Supreme Court of the United States

OCTOBER TERM, 1958

FREDERICK JOHN KASPER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
W. WILSON WHITE,
Assistant Attorney General,
JOSEPH M. F. RYAN, JR.,
HAROLD H. GREENE,
Attorneys,
Department of Justice, Washington 25, D.C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	1
Statute and rule involved	2
Statement	5
Argument	9
Conclusion	21

CITATIONS

Cases:

Amalgamated Clothing Workers v. *Richman Bros.*, 211 F. 2d 449, affirmed, 348 U.S. 511	11
Beavers v. *Haubert*, 198 U.S. 77	12
Brewer v. *Hoxie School District No. 46*, 238 F. 2d 91	11, 14
Brown v. *Board of Education*, 347 U.S. 483	14
Bullock et al. v. *United States*, No. 868, certiorari denied, June 15, 1959	5, 9, 20
Chinn v. *United States*, 228 F. 2d 151	12
Cooper v. *Aaron*, 358 U.S. 1	14
Dickey v. *Turner*, 49 F. 2d 998	14
Garrigan v. *United States*, 163 Fed. 16, certiorari denied, 214 U.S. 514	12
Gicinto v. *United States*, 212 F. 2d 8	15
Green v. *United States*, 356 U.S. 165	14
Himmelfarb v. *United States*, 175 F. 2d 924, certiorari denied, 338 U.S. 860	12
Holt v. *United States*, 218 U.S. 245	15
Hopt v. *Utah*, 110 U.S. 574	19
Horton v. *United States*, 256 F. 2d 138	17
Howat v. *Kansas*, 258 U.S. 181	11
Jencks v. *United States*, 353 U.S. 657	18
Jennings v. *United States*, 264 Fed. 399	10
Kasper v. *Brittain*, 245 F. 2d 92, certiorari denied, 355 U.S. 834	9, 10, 13
Lev, et al. v. *United States*, Nos. 435–437, this Term, at 65–67	19, 20

Cases—Continued

	Page
Local Loan Co. v. *Hunt*, 292 U.S. 234	13
Maggio v. *Zeitz*, 333 U.S. 56	11
Marshall v. *United States*, No. 383, this term, decided June 15, 1959	16
Miller v. *Commonwealth*, 40 F. 2d 820	15
McLouth Steel Corp. v. *Mesta Machine Co.*, 116 F. Supp. 689, affirmed, 214 F. 2d 608	11
McSwain v. *Board of Education of Anderson County*, 138 F. Supp. 570	5
Papworth v. *United States*, 256 F. 2d 125, certiorari denied, 358 U.S. 854	18, 19
Reich v. *United States*, 239 F. 2d 134, certiorari denied, 352 U.S. 1004	12, 14
Reining v. *United States*, 167 F. 2d 362, certiorari denied, 335 U.S. 830	15
Remmer v. *United States*, 347 U.S. 227	15
Rosenberg v. *United States*, No. 451, this Term, at pp. 30–42	18, 19
Scales v. *United States*, No. 488, this Term	20
Thompson v. *Missouri*, 171 U.S. 380	19
Tobin v. *Pielet*, 186 F. 2d 886	13
United States v. *Allied Stevedoring Corp.*, 241 F. 2d 925, certiorari denied, 353 U.S. 984	15
United States v. *Allied Stevedoring Corporation*, 258 F. 2d 104, certiorari denied, 358 U.S. 841	17
United States v. *Benson*, 20 F.R.D. 602	18
United States v. *De Marie*, 261 F. 2d 477	17
United States v. *Gordon*, 253 F. 2d 177	17
United States v. *Grado*, 154 F. Supp. 878	18
United States v. *Grossman*, 154 F. Supp. 813	18
United States v. *Holmes*, 168 F. 2d 888	12
United States v. *Mathison*, 256 F. 2d 803, certiorari denied, 358 U.S. 857	18
United States v. *Miller*, 248 F. 2d 163, certiorari denied, 355 U.S. 905	19, 20
United States v. *Palermo*, 258 F. 2d 397, No. 471, this Term	18
United States v. *Rosenberg*, 257 F. 2d 760, No. 451, this Term	18
United States v. *Tomaiolo*, 249 F. 2d 683	19
United States v. *United Mine Workers*, 330 U.S. 258	10, 11
Wong Tai v. *United States*, 273 U.S. 77	12

Statutes and Rules:	Page
18 U.S.C. 3500	3, 19, 20
28 U.S.C. 1651	13
Federal Rules of Criminal Procedure:	
Rule 17	10
Rule 17(b)	11
Rule 30	2, 17
Rule 65(b)	11
Miscellaneous:	
31 A.L.R. 2d 417	15
3 Moore's *Federal Practice* (2d ed.), p. 1331, Supplementary Note 6	11
S. Rep. No. 981, 85th Cong., 1st Sess., Appendix, p. 8	19
9 Wigmore, *Evidence*, § 2551 (3d ed.)	16

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 966

FREDERICK JOHN KASPER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 2–25) is not yet reported. The opinion of the District Court is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 27, 1959. A timely petition for rehearing was denied on April 30, 1959. The petition for a writ of certiorari was filed on May 29, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's actions contemptuous of court orders were protected by the First Amendment.

2. Whether the injunction was issued in keeping with Rules 17 and 65 of the Federal Rules of Civil Procedure.

3. Whether petitioner was put in double jeopardy by being tried in this case after he had previously been found guilty of another, separate, contempt of the same order of the District Court.

4. Whether the District Court had jurisdiction to issue the injunction.

5. Whether the District Court's determination that a juror was not influenced by a television program depicting him as a fair and impartial person is supported by the evidence.

6. Whether the District Court properly instructed the jury with respect to the state of mind of the victim of the assault perpetrated by the petitioner's co-defendants.

7. Whether the District Court erred in permitting the distribution to the jury of a handbook for jurors prepared under the authorization of the Judicial Conference.

8. Whether the District Court correctly refused to order pretrial inspection of statements by prospective witnesses made to the Federal Bureau of Investigation, and whether it properly screened such statements to determine whether they were related to events referred to in the testimony.

STATUTE AND RULE INVOLVED

1. Rule 30, Federal Rules of Criminal Procedure:

> At the close of the evidence or at such earlier time during the trial as the court reasonably

directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

2. 18 U.S.C. 3500. *Demands for production of statements and reports of witnesses.*

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order

it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from

the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

STATEMENT

This case is a companion to *Bullock et al.* v. *United States*, No. 868, this Term, certiorari denied, June 15, 1959, and arises out of the same circumstances: On January 4, 1956, the District Court for the Eastern District of Tennessee issued an order in *McSwain* v. *Board of Education of Anderson County*, 138 F. Supp. 570, directing the discontinuance of racial segregation in the high schools of Anderson County, Tennessee, by the fall term of 1956. Pursuant to the order, a number of Negroes were registered, and in August 1956, when school opened, 12 Negroes were enrolled in Clinton High School, Clinton, Tennessee (R. 472, Vol. II).[1] On August 25, 1956, petitioner

[1] This reference is to the original transcript of testimony at the trial, which was filed in this Court in *Bullock et al.* v. *United*

John Kasper arrived in Clinton and took various steps designed to oust the Negroes from the high school (R. 604–5, Vol. II). A petition was filed in the District Court for injunctive relief, and on August 29, 1956, that court issued a temporary restraining order enjoining John Kasper and others, and "their agents, servants, representatives, attorneys, and all other persons who are acting or may act in concert with them," from interfering with the carrying out of the desegregation order (R. 52–4, Vol. I). Thereafter, after a hearing, a preliminary injunction issued and, after a further hearing, on September 6, 1956, the injunction was made permanent (R. 59, Vol. I).

On December 5, 1956, the United States Attorney filed a petition charging sixteen persons with criminal contempt for violating the injunction (R. 14a–15a). An order of attachment was issued by the court pursuant to this petition (R. 34–8, Vol. I). On February 25, 1957, the court issued an amended order of attachment which stated that the said sixteen persons in active concert and participation with Kasper had violated the injunction by interfering with the desegregation order by (1) congregating in a threatening manner along the route to Clinton High School taken by the Negro students and intimidating these students from entering the school, and (2) vilifying, attacking, and badly beating Reverend Turner when he escorted

States, No. 868, this Term. Pages cited as R. 1a, etc., refer to petitioner's appendix filed in the Court of Appeals and now on file in this Court as petitioner's record. Similarly, pages cited as R. 1b, etc., refer to the Government's appendix in the court below, on file in this Court. R. 1c, etc., refers to the transcript of evidence introduced on motions for new trial.

the Negro students to the school on December 4, 1956 (R. 40–47, Vol. I).

At the trial on July 8, 1957, it was shown that a concert of action existed between petitioner Kasper and the other defendants. Kasper, Cook, and Charles Currier (husband of Mary Neil Currier) were among the original incorporators of the Tennessee White Citizens Council (R. 448, Vol. I). Kasper was seen at at least one of their meetings along with Cook (R. 452, Vol. I) at the Embassy Club (R. 449, Vol. I). About once a week from August to December 1956, Kasper met at Ann's Cafe and the Southland Cafe from about 7 p.m. to 10 p.m. with Brakebill, Cook, Till, Mrs. Currier, Bullock, Brantley, and others (R. 730–39, Vol. II). Members of the White Citizens Council were also observed congregating in these restaurants and the streets nearby (R. 431, Vol. I). Kasper promised to evict the Negroes from the school (R. 474, Vol. II). He met with school students in Southland Cafe (R. 429–30, Vol. I) and in November 1956, he assisted them in obtaining a charter for the Tennessee White Youth. They all rode to the home of the notary with Cook in his car and either Kasper or Cook paid the incorporation fee (R. 501–503, 563–71, Vol. II). The first meeting was held at the Embassy Club with Brantley's permission (R. 517–18, Vol. II) and in attendance were Kasper, Till, Brakebill, and Brantley (R. 570–71, 592, Vol. II).

Evidence was also adduced that, subsequent to these organizational events, every school-day morning between November 27 and December 3, 1956, several of Kasper's co-conspirators congregated and stationed

themselves in a threatening manner at a street intersection which the Negro children had to pass to get from their homes to the high school (R. 972–78, Vol. III). As a result, the Negro children did not go to school on those days.

On December 4, those persons again parked their cars in the area of the road leading from the Negro section to the school. Threatening remarks were made by several of them to the effect that they would prevent the Negroes from going to school (R. 612, 816–17, Vol. II). Later that morning, Reverend Paul Turner escorted the Negro children through the crowd to the school. On his way to school, Reverend Turner was threatened (R. 644–50, 816–17, 820, 824, 832–34, Vol. II) and when he came back out, Cook and others struck him (R. 835, 838–39, Vol. II; 894, 897, 928–29, 956, 957, Vol. III). In the course of the beating, Turner went down on his knees and his head was bounced against the fender of a car (R. 897, Vol. III). A mob was shouting "kill him" (R. 928–29, Vol. III). Ultimately, the police arrived and Cook was arrested (R. 868, Vol. II).

At the conclusion of the contempt hearing, Kasper and some of his co-defendants were found guilty, while several others were acquitted (R. 1192, Vol. III). Kasper was sentenced to a term in prison and all of the other convicted co-defendants were sentenced to probation for varying terms. Motions for a new trial were denied.

On February 27, 1959, the Court of Appeals affirmed the judgment of the District Court with respect to Kasper and the others. Kasper filed a peti-

tion for a rehearing in that court, which was denied on April 30, 1959.

ARGUMENT

Many of the issues presented by this petitioner are identical with, or similar to, questions raised by the co-defendant petitioners in *Bullock et al.* v. *United States*, No. 868, this Term, certiorari denied, June 15, 1959.[2] There is no more reason to grant review to this petitioner than there was in the case of his co-defendants.

1. It is first argued (Point 1, Pet. 7–9) that the injunction issued by the District Court was repugnant to the First Amendment. Perhaps the best short answer is that given by the Court of Appeals when it passed on the same question involving the same injunction in connection with Kasper's first contempt (*Kasper* v. *Brittain*, 245 F. 2d 92, 95 (C.A. 6), certiorari denied, 355 U.S. 834):

> The right to speak is not absolute and may be regulated to accomplish other legitimate objectives of government. The First Amendment does not confer the right to persuade others to violate the law. *Giboney* v. *Empire Storage Company*, 336 U.S. 490, 502 * * *. The speech here enjoined was clearly calculated to cause a violation of law and speech of that character is not within the protection of the First Amendment, *Dennis* v. *United States*, 341 U.S. 494 * * *; *Feiner* v. *People of State of New York*, 340 U.S. 315; *Beauharnais* v. *People*

[2] For the Court's convenience, we set out our answers *in extenso*, without reference to our brief in opposition to the *Bullock* petition.

of State of Illinois, 343 U.S. 250 * * *; *Chaplinsky* v. *State of New Hampshire*, 315 U.S. 568 * * *.

Petitioner cites decisions having but the most tenuous relationship with the factual and legal situation of this case. None involves an injunction prohibiting the obstruction of a court order, and none passes on circumstances such as those presented here. Kasper's defense in the name of free speech to lawlessness resulting in the intimidation of small children seeking their constitutional rights, and the beating of a minister who came to their aid, strains understanding.

2. Petitioner makes several procedural arguments (Point 2, Pet. 9–13), none of which has merit.

(*a*) He argues that the injunction was issued in violation of Rule 17 of the Federal Rules of Civil Procedure, concerning real parties in interest. The standing of the parties who sought this injunction was sanctioned in the first contempt proceedings. *Kasper* v. *Brittain, supra.* Since Kasper did not appeal the order of injunction, he cannot now raise the question. *United States* v. *United Mine Workers*, 330 U.S. 258; *Jennings* v. *United States*, 264 Fed. 399 (C.A. 8). In any event, the interest of the petitioning parties was very real indeed. They included the principal of Clinton High School, a member of the Board of Education of Anderson County, two attorneys involved in the desegregation litigation concerning the high school, and an Assistant Attorney General for the Nineteenth Judicial Circuit for the State of Tennessee (R. 2a–3a). They filed this petition in view of their official connection with the desegregation litigation of Clinton High School and their concern for the main-

tenance of respect for the laws of Tennessee and the United States and respect for the District Court and the Supreme Court of the United States (R. 3a). Clearly, they had standing.[3]

Rule 65(b) provides that no temporary restraining order be granted without notice unless it clearly appears from the specific facts pleaded that immediate and irreparable injury or loss or damage would result to the applicant before notice and hearing. The verified petition in this case (R. 2a–9a) pleaded such facts in abundance. Beyond that, a full hearing was had with respect to the preliminary and permanent injunctions, and any defect in the issuance of the temporary restraining order therefore becomes immaterial.

Finally, even if the injunction was invalid for any reason, petitioner was properly chargeable with criminal contempt for violating it. *United States* v. *United Mine Workers,* 330 U.S. 258; *Howat* v. *Kansas,* 258 U.S. 181, 189–190. See also *Maggio* v. *Zeitz,* 333 U.S. 56, 69; *Amalgamated Clothing Workers* v. *Richman Bros.,* 211 F. 2d 449, 452 (C.A. 6), affirmed, 348 U.S. 511.

(*b*) Petitioner also complains that the injunction could not be binding on him because he was not a

[3] As for the argument that the Board of Education should have petitioned in its official capacity, as in the case of *Brewer* v. *Hoxie School District No. 46,* 238 F. 2d 91 (C.A. 8), the failure to move for a joinder of the Board constitutes a waiver of the objection. See 3 Moore's *Federal Practice* (2d ed.), p. 1331, supplementary note 6; *McLouth Steel Corp.* v. *Mesta Machine Co.,* 116 F. Supp. 689 (E.D. Pa.), affirmed, 214 F. 2d 608 (C.A. 3). Moreover, Rule 17(b) merely permits but does not require an unincorporated association such as the school board to sue in its common name.

party to the original action. But he was a party to the September 1956 injunctive action, having been specifically named in the petition (R. 2a–9a), and whether or not he was a party to the original desegregation suit is immaterial. *Reich* v. *United States*, 239 F. 2d 134 (C.A. 1), certiorari denied, 352 U.S. 1004; *Garrigan* v. *United States*, 163 Fed. 16 (C.A. 7), certiorari denied, 214 U.S. 514. He was not here charged with violating the order of January 4, 1956 (*supra*, p. 5); he was charged with and found guilty of violating the permanent injunction issued on September 6, 1956 (*supra*, p. 6) (R. 36a). He was a party to the proceedings involving that order; it was served upon him; and he had actual notice thereof.

(*c*) Kasper also says that his motion for a bill of particulars should have been granted, but nothing is cited in support of the bare contention. Actually, the amended order of attachment, issued on February 25, 1957, is particular as to the acts charged, the dates of their occurrence, and the persons alleged to be guilty of committing them. It lists several specific overt acts (R. 42–47, Vol. I). It amply satisfied the requirements of notice; there was no abuse of discretion. *Wong Tai* v. *United States*, 273 U.S. 77; *Himmelfarb* v. *United States*, 175 F. 2d 924 (C.A. 9), certiorari denied, 338 U.S. 860.*

---

*Petitioner's Point 2d (Pet. 13) appears to be identical with his Point No. 13 (Pet. 27–28). See pp. 18–20, *infra*. As for the contention that there was a denial of the right to a speedy trial (Point 16, Pet. 31), it is clear that there was neither arbitrary action nor prejudice. See *Beavers* v. *Haubert*, 198 U.S. 77; *United States* v. *Holmes*, 168 F. 2d 888 (C.A. 3); *Chinn* v. *United States*, 228 F. 2d 151 (C.A. 4).

3. Petitioner claims double jeopardy (Point 3, Pet. 13–14) because this is the second time he has been found guilty of contempt of the order of the District Court. This contention likewise has no substance. The first finding of guilty was for an individual act of contempt of the restraining order occurring on August 29, 1956. The present judgment was for a second separate contempt of the permanent injunction (R. 42, Vol. I) in November and December, 1956, by Kasper and several others. That Kasper was found guilty of one contempt of court did not immunize him from punishment for subsequent contemptuous conduct. He was no more protected from a second finding of contempt than a narcotics peddler is immune from two convictions for two sales of heroin made several months apart. See *Tobin* v. *Pielet*, 186 F. 2d 886 (C.A. 7).[5]

4. Petitioner questions the jurisdiction of the District Court to issue the injunction (Point 4, Pet. 15–20). The restraining order and the injunctions specifically refer to the January 1956 order concerning desegregation, and enjoin its violation. Undoubtedly, a court has jurisdiction to enforce and to prevent violations of its own orders. See 28 U.S.C. 1651; *Local Loan Co.* v. *Hunt*, 292 U.S. 234, 239. This

[5] The cases cited by petitioner are readily distinguishable since their holdings concern examination of recalcitrant witnesses and stand only for the principle that the prosecution cannot multiply contempts by repeated questioning on the same subject of inquiry. The jury found from the evidence here that Kasper committed contempt in November and December of 1956. This contempt was neither charged nor punished in *Kasper* v. *Brittain*, *supra*.

ancillary jurisdiction extended to petitioner even though he was not a party to the original suit which resulted in the desegregation order. *Reich* v. *United States*, 239 F. 2d 134 (C.A. 1), certiorari denied, 352 U.S. 1004; *Dickey* v. *Turner*, 49 F. 2d 998 (C.A. 6); *Brewer* v. *Hoxie School District No. 46*, 238 F. 2d 91 (C.A. 8).*

5. Petitioner contends (Point 11, Pet. 25–27) that the District Court erred in refusing to grant a new trial because a juror viewed a television program in the course of which that juror was referred to as a citizen of honesty and integrity who could be depended upon to render an honest verdict.

The District Court found that the juror was not influenced in his verdict by reason of the program, and the Court of Appeals held that this finding was "amply supported by the evidence" (Pet. App. 24). The trial finding was made after a full hearing on the incident and after the court had reviewed the evidence with care and in detail (R. 156c–158c). In view of the innocuous nature of the broadcast, which reflected nothing more than local respect for the juror and faith in his honesty and integrity with regard to the trial, no other conclusion was possible. The facts

* This disposes also of the contentions that the court had no jurisdiction over his co-defendants (Point 17, Pet. 32), and that only the state authorities had power to deal with him (Points 6 and 8, Pet. 22, 23–24). As for the remainder of Point 8—that petitioner should have been indicted rather than proceeded against by contempt—see *Green* v. *United States*, 356 U.S. 165.

It is, of course, wholly unnecessary to notice petitioner's attack (Point 5, Pet. 20–21) on *Brown* v. *Board of Education*, 347 U.S. 483. See *Cooper* v. *Aaron*, 358 U.S. 1.

cannot be so viewed as to compel disregard of both the discretionary power of the trial judge on a motion for a new trial and the determination of the Court of Appeals that he was right in his ruling. Cf. *Gicinto* v. *United States*, 212 F. 2d 8 (C.A. 8); *United States* v. *Allied Stevedoring Corp.*, 241 F. 2d 925 (C.A. 2), certiorari denied, 353 U.S. 984; *Reining* v. *United States*, 167 F. 2d 362 (C.A. 5), certiorari denied, 335 U.S. 830; *Miller* v. *Commonwealth*, 40 F. 2d 820 (C.A. 6); see, also, 31 A.L.R. 2d 417.

Petitioner relies upon *Remmer* v. *United States*, 347 U.S. 227, for the proposition that a presumption of prejudice exists. But *Remmer* dealt with *private* contacts with the jury which went to the merits of the case then on trial. Here, the medium of communication was public and did not touch on the merits or on petitioner. The general rule with respect to the public media of communication was enunciated by Mr. Justice Holmes in *Holt* v. *United States*, 218 U.S. 245 at 251:

> If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day.

When jurors happen to be exposed to radio reports, television programs, and newspaper articles concerning the trial—despite the admonitions by the trial judge—the facts must be aired thoroughly and the judge satisfy himself that in fact no prejudice existed. In this case, the trial judge complied with that rule,

and there is no reason to overturn his findings which have been confirmed by the Court of Appeals.[7]

6. It is also claimed (Point 14, Pet. 28–29) that the District Court erred when it charged that Reverend Turner's action of escorting the Negro children to the school was a "good deed." What the court did say was that "*From the standpoint of integration what he did was a well-intentioned contribution.* Now the jury is called upon to determine whether his being afterwards beaten had the retroactive effect of *undoing the good deed* done by him earlier in the morning" (R. 1172, Vol. III) (emphasis added). In context the statement was a proper comment on the evidence. See 9 Wigmore, *Evidence*, Section 2551 (3d ed.). Additionally, when counsel objected to this portion of the charge, the court gave a supplemental instruction in which it stated, in pertinent part (R. 1187, Vol. III):

> * * * I said to you in the course of the charge that, from the standpoint of integration what Reverend Turner did was a well-intentioned contribution. *From the standpoint of segregation it might not be considered a well-intentioned contribution.* * * * If his intention had any bearing on that question, his intention on the occasion in question is a question of fact for the jury to determine * * * [Emphasis added.]

---

[7] This case is unlike *Marshall* v. *United States*, No. 383, this Term, decided June 15, 1959, for the prejudicial newspaper articles there involved dealt with an issue directly related to the trial (entrapment), whereas the program in this case made no mention of the issues but dealt solely with the juror as a person.

After this supplemental instruction had been given, the court asked whether there were any further objections to the charge, and counsel for petitioner replied in the negative (R. 1188, Vol. III). The present claim of error is therefore foreclosed by Rule 30, F.R. Crim. P.[8]

7. It is also urged (Point 15, Pet. 30–31) that the District Court erred in permitting the distribution to the jury prior to trial of a pamphlet known as the "Handbook for Jurors Serving in the United States District Courts". The practice of distributing this booklet has been attacked in several circuits, but in no case has it caused a reversal. *United States* v. *Allied Stevedoring Corporation*, 258 F. 2d 104 (C.A. 2), certiorari denied, 358 U.S. 841; *United States* v. *Gordon*, 253 F. 2d 177, 184–5 (C.A. 7); *Horton* v. *United States*, 256 F. 2d 138 (C.A. 6); *United States* v. *De Marie*, 261 F. 2d 477 (C.A. 7). In the *Allied Stevedoring* case, *supra*, the court stated (at p. 107): "We find nothing improper in the use of the Handbook. In fact we believe that it accomplishes a necessary purpose and that its use should be encouraged." And, as the Court of Appeals here suggested, petitioner's objection came too late in any event since it was not made on the *voir dire*. See *United States* v. *Gordon*, *supra*; *United States* v. *Allied Stevedor-*

[8] The Court of Appeals found that the District Court's charge to the jury was "fair and accurate" (Pet. App., 16). In view of this finding and of the petitioner's failure to specify wherein the charge was prejudicial, his Point 9 (Pet. 24), alleging that the jury was permitted to speculate as to his associations, is without merit.

ing Corp., supra; *United States* v. *Mathison*, 256 F. 2d 803 (C.A. 7), certiorari denied, 358 U.S. 857.[9]

8. Petitioner questions (Points 2d and 13, Pet. 13, 27–28) whether the District Court was justified in denying the request for a pretrial inspection of statements given to the Federal Bureau of Investigation by potential witnesses. This issue is fully discussed in the Government's brief in *Rosenberg* v. *United States*, No. 451, this Term, at pp. 30–42. As there pointed out, the Court in *Jencks* v. *United States*, 353 U.S. 657, was not concerned with pretrial inspection, and most of the courts which have had occasion to consider this question have concluded that such inspection is not compelled. See, *e.g.*, *United States* v. *Rosenberg*, 257 F. 2d 760 (C.A. 3), No. 451, this Term; *United States* v. *Grossman*, 154 F. Supp. 813 (D.N.J.); *United States* v. *Grado*, 154 F. Supp. 878 (W.D. Mo.); *Papworth* v. *United States*, 256 F. 2d 125 (C.A. 5), certiorari denied, 358 U.S. 854; *United States* v. *Benson*, 20 F.R.D. 602 (S.D.N.Y.); *United States* v. *Palermo*, 258 F. 2d 397 (C.A. 2), No. 471, this Term. The Senate Report on the bill designed to clarify the various lower court interpretations of *Jencks* indicated that the Judiciary Committee felt that any construction of *Jencks* requiring pretrial inspection was surprising inasmuch as the "overwhelming judicial thought * * * [is that *Jencks*] does not apply to pre-

[9] Petitioner's Points 7 and 10 (Pet. 22–23, 24), in which he alleges that the verdict was not supported by the evidence, are essentially fact questions which are not a proper subject for review on certiorari. In any event, there was ample evidence to support the verdict. See the Statement, *supra*, pp. 7–8.

trial production * * *." S. Rep. No. 981, 85th Cong., 1st Sess., Appendix, p. 8.

Beyond that, the "Jencks" Act, 18 U.S.C. 3500, *supra*, pp. 3–5, explicitly provides that "* * * no statement or report * * * shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case." In view of this clear prohibition on pre-trial discovery of such statements, and since any new trial would have to be held under the procedural rules laid down by Section 3500, it is unnecessary in this case to decide whether *Jencks*, taken by itself, would direct pre-trial discovery. See *United States* v. *Miller*, 248 F. 2d 163 (C.A. 2), certiorari denied, 355 U.S. 905; *United States* v. *Tomaiolo*, 249 F. 2d 683 (C.A. 2); *Papworth* v. *United States*, *supra*. Consideration of the claimed error in the light of the changed law does not violate the constitutional *ex post facto* prohibition. *Hopt* v. *Utah*, 110 U.S. 574; *Thompson* v. *Missouri*, 171 U.S. 380. See the Government's brief in *Lev, et al.* v. *United States*, Nos. 435–437, this Term, at 65–67.

Petitioner further asserts (Point 12, Pet. 27–28) that the court should not have screened the FBI reports. This Court, in *Jencks*, did not prohibit all screening by the trial judge; on the contrary, it held that a foundation for inspection must still be laid, in that it must be established that the reports are "of the events and activities related in [the] testimony." (353 U.S. at 666). See the Government's brief in *Rosenberg* v. *United States*, *supra*, pp. 42–62. In the instant case, the trial court generally allowed the signed statements of the witness to be turned over to

the defendant prior to direct examination and without any prior screening, which is a more liberal practice than *Jencks* requires (R. 158, 159; 242; 305; 424; 454, Vol. I; 495; 574; 588; 603; 634 (excised portion was either subsequently given to defense or was not requested); 766; 774; 781; 802; 860, Vol. II; 892; 927; 943; 952; 959; 963–4, Vol. III). In only a few cases were portions excised by the court and then on the ground that the particular fragment was unrelated to the testimony of the witness (R. 208, 227; 296, Vol. I; 493; 717, 744, Vol. II; 877–878, 891; 933, Vol. III). The excised portions were sealed and filed as Exhibits 4, 6, 23, 27, 28, and 30, respectively.[10] Petitioner was not prejudiced by the court's rulings in this respect and thus has no just cause for complaint. See *United States* v. *Miller, supra.* And of course with respect to this issue, too, 18 U.S.C. 3500 cured any defect. See the Government's brief in *Scales* v. *United States,* No. 488, this Term at 99–110, and *Lev, et al.* v. *United States,* Nos. 435–437, *supra.*

[10] The exhibits in this case were filed with this court with the transcript of record in *Bullock, et al.* v. *United States,* No. 868.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

W. WILSON WHITE,
Assistant Attorney General.

JOSEPH M. F. RYAN, JR.,
HAROLD H. GREENE,
Attorneys.

JUNE 1959.

U.S. GOVERNMENT PRINTING OFFICE 1959